No. 14-114

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL,
AS U.S. SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE COMMONWEALTHS OF VIRGINIA, KENTUCKY, MASSACHUSETTS, AND PENNSYLVANIA, THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MISSISSIPPI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

MARK R. HERRING
Attorney General
of Virginia
CYNTHIA BAILEY
Deputy Attorney General
KIM PINER
Senior Assistant
Attorney General
CARLY L. RUSH
Assistant Attorney
General

January 28, 2015

STUART A. RAPHAEL*
Solicitor General
of Virginia
**Counsel of Record*
TREVOR S. COX
Deputy Solicitor General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240
sraphael@oag.state.va.us

Counsel for Amici Curiae

[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Patient Protection and Affordable Care Act provides premium-assistance tax credits to help low- and moderate-income Americans purchase health insurance through a State-specific marketplace called an "Exchange." Two subsections of 26 U.S.C. § 36B describe the formula for calculating the tax credit in reference to a health plan enrolled in through an "Exchange established by the State under [§] 1311 [42 U.S.C. § 18031]." The Act requires that each State "shall . establish . an . . Exchange . for the State," 42 U.S.C. § 18031(b)(1), and provides that if a State does not establish the "required Exchange," the Secretary of Health and Human Services (HHS) shall establish and operate "such Exchange," 42 U.S.C. § 18041(c)(1). The term "Exchange" is defined as "an American Health Benefit Exchange established under section 18031 of this title." 42 U.S.C. § 300gg-91(d)(21).

The Internal Revenue Service (IRS), through notice-and-comment rulemaking, interpreted the Act to make tax credits available both in a State that establishes the required Exchange for itself and in a State that allows HHS to establish "such Exchange" in its stead. 26 C.F.R. § 1.36B-1(k); *see* 77 Fed. Reg. 30,377, 30,378 (2012).

The question presented is whether the IRS permissibly interpreted the Act to make premium-assistance tax credits available through the Exchanges in every State.

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GLOSSARY

ACA	Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.
FFE	Federally-facilitated Exchange. *See* 45 C.F.R. § 155.20.
IRS Rule	Final regulations, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377 (May 23, 2012) (codified at 26 C.F.R. § 1.36B-1(k)).
Partnership Exchange	A variation of a Federally-facilitated Exchange in which HHS and States work together on the operation of an Exchange. *See* 77 Fed. Reg. 18,310, 18,325 (2012).
Secretary	Secretary of the United States Department of Health and Human Services.

INTEREST OF AMICI CURIAE

The Commonwealths of Virginia and Pennsylvania and the States of Maine, Mississippi, North Carolina, and North Dakota elected to forgo establishing their own Exchange under the ACA with the understanding that relying on a federally-facilitated Exchange would not harm State citizens or interfere with State insurance markets. Sharing that same understanding, the States of Delaware, Illinois, Iowa, and New Hampshire implemented a federally-facilitated Exchange through a partnership model, retaining responsibility for certain core functions while leveraging the shared federal infrastructure to ensure financial viability. These amici are "FFE" States.

The States of California, Connecticut, Hawaii, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealths of Kentucky and Massachusetts, and the District of Columbia created their own Exchanges with the understanding that the ACA would provide premium-assistance tax credits to residents of all States. These amici are State-Exchange States.

Whether an FFE State or a State-Exchange State, *every* State in the union will be affected by the outcome of this litigation. Petitioners' erroneous construction of the ACA would deprive millions of low- and moderate-income Americans of billions of dollars in federal premium assistance essential to buy health insurance, thereby disrupting State insurance markets throughout the United States and threatening

the ability of the ACA to operate as a comprehensive nationwide program.

Petitioners' construction would also violate basic principles of cooperative federalism by surprising the States with a dramatic hidden consequence of their Exchange election. Every State engaged in extensive deliberations to select the Exchange best suited to its needs. None had reason to believe that choosing a federally-facilitated Exchange would alter so fundamental a feature of the ACA as the availability of tax credits. Nothing in the ACA provided clear notice of that risk, and retroactively imposing such a new condition now would upend the bargain the States thought they had struck.

Accordingly, Amici States join together here to urge the Court to affirm the judgment of the court of appeals.

SUMMARY OF ARGUMENT

The ACA expressly offered States "flexibility" with respect to the creation and operation of Exchanges. A State could establish an Exchange for itself or rely on HHS to create one. But Petitioners contend that that offer was not genuine. They claim that Congress sought to pressure States to create their own Exchanges, and to punish them for using an FFE, by (1) making health insurance in FFE States unaffordable to low- and moderate-income citizens and (2) rendering insurance markets in FFE

States inoperable. That claim has no plausible basis in the text of the statute. What is more, under the *Pennhurst* doctrine, Congress must give States "clear notice" of conditions imposed under cooperative-federalism programs. There was no such clear notice here. To the contrary, State officials reasonably assumed that premium-assistance tax credits would be available in every State, regardless of who created the Exchange.

Petitioners' interpretation should also be rejected because it would raise serious questions under the Tenth Amendment. Petitioners attribute to Congress a novel kind of coercion that threatens State citizens and State insurance markets as a means of pressuring State governments to take action. Not only is such a scheme antithetical to the Act's cooperative-federalism model, but the constitutional-doubt canon counsels against attributing such a coercive intention to Congress.

ARGUMENT

I. In the nation's thirty-four FFE States, millions of citizens depend on tax credits to afford the health insurance that the ACA requires them to purchase.

As this Court recognized in *National Federation of Independent Business v. Sebelius* ("*NFIB*"), Congress enacted the ACA "to increase the number of Americans covered by health insurance and decrease the

cost of health care."[1] The Court in *NFIB* upheld one pillar of the ACA, the "individual mandate," which requires most Americans to maintain "minimum essential coverage" for themselves and their dependents.[2] A second pillar rests on the guaranteed-issue/community-rating provisions, which require insurers to provide coverage and set premiums without regard to a person's medical history or prior medical condition. The third pillar, at issue in this case, is the provision of premium-assistance tax credits, "an essential component of the Act's viability."[3] These pillars are aptly characterized as three legs of the stool; if one leg should fail, the stool will collapse.[4]

Each State was required to establish an Exchange by January 1, 2014.[5] Congress offered generous financial grants to assist them.[6] States were also given substantial flexibility in choosing how to establish and operate Exchanges.[7] But if a State elected not to estal sh an Exchange, or failed to do so, the

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[1] 132 S. Ct. 2566, 2580 (2012).

[2] 26 U.S.C. § 5000A(a). *See NFIB*, 132 S. Ct. at 2580, 2601.

[3] *King v. Burwell*, 759 F.3d 358, 375 (4th Cir. 2014).

[4] *Halbig v. Burwell*, 758 F.3d 390, 418-22 (D.C. Cir. 2014) (Edwards, J., dissenting), *reh'g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014) (en banc).

[5] 42 U.S.C. § 18031(b)(1).

[6] 42 U.S.C. § 18031(a).

[7] *See generally* 77 Fed. Reg. 18,310, 18,311 (2012).

ACA directed the Secretary to "establish and operate such Exchange within the State."[8]

In order to help individual Americans *afford* the health insurance that the individual mandate *requires* them to buy, Congress provided tax credits to offset the premium cost. In 26 U.S.C. § 36B, such credits are provided to "an applicable taxpayer"[9] whose family income is between 100% and 400% of the federal poverty level.[10] The ACA also provides additional "cost-sharing reductions" to such individuals.[11]

It is impossible to overstate the importance of those tax credits to enable low- and moderate-income Americans to afford quality health insurance. For instance, the Henry J. Kaiser Family Foundation's widely used subsidy calculator estimates that a single 36-year-old mother of two children living in Richmond, Virginia, earning $25,000 a year (126% of the federal poverty level), could purchase a silver-level health-insurance plan for her family for an annual premium of $3,001, with 83% of that cost ($2,498) defrayed by the tax credit—meaning that she would pay only $503 per year.[12] A single 52-year-old man earning $20,000 (171% of the poverty level) would

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[8] 42 U.S.C. § 18041(c)(1).

[9] 26 U.S.C. § 36B(a).

[10] *Id.* § 36B(c)(1)(A).

[11] 42 U.S.C. § 18071(c).

[12] Kaiser Family Found., *Subsidy Calculator* (2015), http://kff.org/interactive/subsidy-calculator/.

face a premium of $4,762, but 79% ($3,760) would be covered by the tax credit, costing him only $1,002 per year.

The subsidies are crucial to the ACA's success. Without them, "many if not most uninsured people could not afford coverage."[13] Recognizing that low-income Americans cannot be penalized for failing to buy insurance they cannot afford, Congress exempted those who fail to purchase health insurance if their premium cost—after tax credits—would exceed 8% of their household income.[14] With federal subsidies available, only 3% of those eligible for subsidies would be exempt from the individual mandate.[15] In other words, the ACA both encourages low-income Americans to buy health coverage and ensures that they have the means to do so.

Indeed, the proportion of enrollees relying on tax credits is increasing. In the early months of the 2015 open-enrollment period, 87% of enrollees selected plans using financial assistance (tax credits and cost-sharing reductions), compared to 80% in the early months of last year's open-enrollment period.[16]

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[13] Larry Levitt & Gary Claxton, Kaiser Family Found., *The Potential Side Effects of Halbig* (July 31, 2014), http://kff.org/health-reform/perspective/the-potential-side-effects-of-halbig/.

[14] 26 U.S.C. § 5000A(e)(1)(A).

[15] Levitt & Claxton, *supra* note 13.

[16] U.S. Dep't of Health & Human Servs., *Health Insurance Marketplace 2015 Open Enrollment Period: December Enrollment*

(Continued on following page)

Premiums are "holding stable," and "nearly 8 in 10 current consumers" can obtain monthly coverage "for $100 or less after tax credits."[17]

If the subsidies become unavailable in FFE States, then 83% of those persons formerly eligible for subsidies would "end up being exempt from the individual mandate."[18] Their unsubsidized premium cost would become unaffordable—exceeding 8% of their income. They and their families would go uninsured, taking cold comfort, perhaps, in knowing that they will not have to pay a tax penalty. The rest would be required to buy insurance at full cost, without any subsidy, or pay a penalty for not doing so.

A recent study by researchers at the Urban Institute predicts that the elimination of premium-assistance tax credits in the 34 FFE States would cause more than 9.3 million people to lose almost $29 billion in subsidies—an average of $3,090 per person—increasing the number of uninsured by about 8.2 million people.[19] Table 4 of the study,[20] reproduced

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Report 7 (Dec. 30, 2014), http://aspe.hhs.gov/health/reports/2014/MarketPlaceEnrollment/Dec2014/ib_2014Dec_enrollment.pdf.

[17] U.S. Dep't of Health & Human Servs., *The Affordable Care Act is Working* (last visited Jan. 28, 2015), http://www.hhs.gov/healthcare/facts/factsheets/2014/10/affordable-care-act-is-working.html.

[18] Levitt & Claxton, *supra* note 13.

[19] Linda J. Blumberg, Matthew Buettgens & John Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in* King vs. Burwell*: 8.2 Million More Uninsured and 35% Higher*

(Continued on following page)

in part below, summarizes the impact in each FFE State:

State	Number of People Losing Tax Credits	Total Value of Tax Credits & CSRs Lost (Millions $)	Increase in the Number of People Uninsured
All [FFE] States	**9,346,000**	**28,837.7**	**8,151,000**
Alabama	165,000	547.1	124,000
Alaska	42,000	232.8	34,000
Arizona	266,000	456.1	237,000
Arkansas	128,000	418.8	95,000
Delaware	28,000	92.4	24,000
Florida	1,184,000	3,891.4	1,073,000
Georgia	461,000	1,524.9	435,000
Illinois	438,000	1,089.0	408,000
Indiana	225,000	924.5	195,000
Iowa	98,000	289.2	90,000
Kansas	166,000	419.0	135,000
Louisiana	214,000	857.4	199,000
Maine	62,000	257.0	50,000
Michigan	321,000	905.8	277,000
Mississippi	147,000	568.0	137,000
Missouri	299,000	1,006.8	228,000

Premiums 5 (Jan. 2015), http://www.urban.org/UploadedPDF/2000062-The-Implications-King-vs-Burwell.pdf.

[20] *Id.*

Montana	70,000	192.3	61,000
Nebraska	97,000	282.3	83,000
New Hampshire	44,000	116.0	37,000
New Jersey	237,000	727.6	239,000
North Carolina	465,000	1,830.1	407,000
North Dakota	39,000	122.6	29,000
Ohio	497,000	1,510.1	459,000
Oklahoma	208,000	516.0	153,000
Pennsylvania	414,000	1,082.8	329,000
South Carolina	241,000	766.3	192,000
South Dakota	51,000	147.1	42,000
Tennessee	320,000	782.7	230,000
Texas	1,566,000	4,358.1	1,441,000
Utah	162,000	361.6	97,000
Virginia	321,000	1,071.4	280,000
West Virginia	41,000	146.3	49,000
Wisconsin	289,000	1,127.9	247,000
Wyoming	40,000	216.3	37,000

II. Petitioners' interpretation would destroy State insurance markets and render the ACA unworkable.

Withholding premium-assistance tax credits would destabilize insurance markets and "effectively destroy"[21] the ACA, given the interrelatedness of the individual mandate, the premium subsidies, and the

[21] *King*, 759 F.3d at 379 (Davis, J., concurring).

guaranteed-issue/community-rating provisions. Each leg of the "three-legged stool" is vital.[22]

The critical function of the subsidies, in particular, led four Justices in *NFIB* to conclude that insurance markets would not function properly without them:

> [The] system of incentives collapses if the federal subsidies are invalidated. Without the federal subsidies, individuals would lose the main incentive to purchase insurance inside the exchanges, and some insurers may be unwilling to offer insurance inside of exchanges. With fewer buyers and even fewer sellers, the exchanges would not operate as Congress intended and may not operate at all.[23]

Indeed, "[t]he result could be what is commonly called a 'death spiral,' as healthy people exit the market and premiums rise even more."[24] Consistent with that prediction, a recent RAND Corporation study concluded that if subsidies are eliminated in FFE States, enrollments will decline by 9.6 million to 4.1 million, a 70% decrease,[25] and average premiums would

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[22] *Halbig*, 758 F.3d at 418-22 (Edwards, J., dissenting).

[23] 132 S. Ct. at 2674 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[24] Levitt & Claxton, *supra* note 13.

[25] Christine Eibner & Evan Saltzman, RAND Corp., *The Effect of Eliminating the Affordable Care Act's Tax Credits*

(Continued on following page)

increase by 47%.[26] That combination would "threaten[] the viability of the market."[27] The Urban Institute study reached comparable conclusions.[28]

According to Petitioners, those dire consequences result by design from Congress's use of "sticks" and "carrots" to pressure States to create their own Exchanges and to deter them from relying on FFEs.[29] As shown below, that reading is not only implausible—it is foreclosed by the *Pennhurst* doctrine. Congress did not give States clear notice that their citizens would be punished and their insurance markets ruined if the State chose an FFE. And constitutional-avoidance principles likewise weigh heavily against Petitioners' interpretation because the use of such a threat to pressure States into building their own Exchanges would raise serious questions under the Tenth Amendment.

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in Federally Facilitated Marketplaces 5 (Jan. 2015), http://www.rand.org/pubs/research_reports/RR980.html.

[26] *Id.*

[27] *Id.* at 6.

[28] Blumberg, Buettgens & Holahan, *supra* note 19, at 1 (predicting 8.2 million more uninsured people and 35% higher premiums in FFE States).

[29] Pet'rs' Br. 2-3.

III. Petitioners' interpretation of the ACA is untenable under the *Pennhurst* doctrine because Congress did not give the States clear notice of the alleged consequences of relying on a federally-facilitated Exchange.

A. The *Pennhurst* doctrine requires that Congress give States clear notice of conditions imposed under cooperative-federalism programs.

When Congress enacts cooperative-federalism programs, the States are entitled to clear notice about the conditions to which they have agreed.[30] The Court in *Pennhurst State School & Hospital v. Halderman*[31] described that clear-statement rule this way:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal

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[30] *NFIB*, 132 S. Ct. at 2602, 2605-06.

[31] 451 U.S. 1 (1981).

> moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.[32]

In 2006, in *Arlington Central School District Board of Education v. Murphy*,[33] the Court applied *Pennhurst* to conclude that expert-witness fees were not recoverable by a prevailing party under the Individuals with Disabilities Education Act.[34] Writing for the majority, Justice Alito explained that the statute must be interpreted from "*the perspective of a state official* who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds."[35] "We must ask whether such a state official would *clearly understand* that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees."[36] In other words, "clear notice" is required.[37]

The Court applied *Pennhurst* again in *NFIB*, striking down the ACA's provision that denied all Medicaid funding to States that failed to adopt

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[32] *Id.* at 17 (citations and footnote omitted).

[33] 548 U.S. 291 (2006).

[34] 20 U.S.C. § 1415(i)(3)(B).

[35] 548 U.S. at 296 (emphasis added).

[36] *Id.* (emphasis added).

[37] *Id.*

Medicaid expansion. Three Justices concluded that the States lacked clear notice that participating in the Medicaid program would subject them to such a draconian, later-imposed condition.[38] Chief Justice Roberts wrote for the plurality that, while "'Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions.'"[39] Four other Justices agreed that the *Pennhurst* principle applied to the ACA,[40] but they found the Medicaid-expansion requirement unconstitutional because it improperly coerced States into adopting a federal program.[41]

Pennhurst's clear-statement rule is critical to cooperative federalism. In a cooperative-federalism model, federal law establishes certain core requirements but gives States the freedom to decide whether and how to implement their own programs within those requirements. Cooperative federalism respects State sovereignty by leaving to each State "the ultimate decision" whether to accept the burdens and benefits of the federal scheme.[42] Such local decision-making promotes "greater citizen involvement in

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[38] 132 S. Ct. at 2602-06 (plurality opinion by Roberts, C.J., joined by Breyer and Kagan, JJ.).

[39] *Id.* at 2606 (quoting *Pennhurst*, 451 U.S. at 25).

[40] *Id.* at 2659 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[41] *Id.* at 2666.

[42] *New York v. United States*, 505 U.S. 144, 168 (1992).

democratic processes" and the adoption of "policies more sensitive to the diverse needs of a heterogeneous society."[43] But the local deliberation promoted by cooperative federalism is meaningless if the costs and benefits of the States' choices are not transparent. Permitting hidden consequences to apply retroactively undermines a State's ability to evaluate its options realistically.

B. The States selected among Exchange options without clear notice that the choice could harm their citizens and disrupt their insurance markets.

The ACA established a cooperative-federalism model that promised "State *Flexibility* Relating to Exchanges."[44] Each State engaged in a careful and thorough deliberative process to choose the Exchange model best suited to its specific needs. That decision was not lightly made. The States established committees and working groups to evaluate Exchange choices; engaged with federal regulators to understand the options; hired private consultants to provide expert advice; solicited public input to understand

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[43] *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quotation marks omitted).

[44] 124 Stat. 120 (Title I, Subtitle D, part 3) (emphasis added).

stakeholders' views; and received grants to assist with planning.[45]

While the extensive records of that deliberative process show that the States relied on many factors and came to diverse conclusions when selecting an Exchange model, conspicuously absent is evidence that States contemplated the dramatic consequence of depriving their residents of tax credits or destroying their own insurance markets. To the contrary, States as diverse as Alaska,[46] Ohio,[47] and Delaware[48] weighed the benefits and burdens without ever suggesting that the ACA conditioned premium assistance on a State's creating its own Exchange. States assumed that tax credits would be available without

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[45] Sarah Dash, et al., The Ctr. on Health Ins. Reforms, Georgetown Univ. Health Policy Inst., *Implementing the Affordable Care Act: State Decisions about Health Insurance Exchange Establishment* 2, 15-17 (Apr. 2013), https://georgetown.box.com/shared/static/pfmjd22ofj03z7qes8w3.pdf.

[46] Pub. Consulting Grp., Alaska Dep't of Health & Soc. Servs. Health Ins. Exchange Planning, *Final Report* 40 (June 21, 2012), http://dhss.alaska.gov/Documents/Pdfs/AKHealthExchangeReport2012.pdf (tax credits available in "all states").

[47] Letter from Governor John R. Kasich to Dir. Gary Cohen, CMMS (Nov. 12, 2012) ("Regardless of who runs the exchange, the end product is the same."), http://www.governor.ohio.gov/Portals/0/pdf/11.16.12%20Letter%20to%20HHS.pdf.

[48] Amirah Ellis & Edward Ratledge, Univ. of Delaware, *Delaware and the Patient Protection Affordable Care Act* 6-7 (updated Aug. 2011), http://dhss.delaware.gov/dhcc/files/issuebrief.pdf (describing tax-credit availability irrespective of whether HHS "fulfill[s]"Exchange requirement).

regard to which sovereign created the Exchange, as reflected in reports issued in Illinois,[49] Oregon,[50] and Washington.[51] And when the National Governors Association published an Issue Brief in 2011 to assist States in their deliberations, it did not mention that tax credits might be unavailable in FFE States.[52]

The States that decided not to build their own Exchanges did so for a variety of reasons. Many determined that they could not complete an Exchange within the tight federal deadlines, that there were too many regulatory uncertainties, or that an FFE would be a stepping stone to eventually creating a State-based Exchange.[53] Others did so based on concerns

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[49] Health Mgmt. Assocs., Wakely Consulting Grp., *Illinois Exchange Strategic and Operational Needs Assessment, Final Report* 2, 11, 20 (Sept. 2011), http://cgfa.ilga.gov/upload/final%20il%20exchange%20needs%20assessment%20091511.pdf.

[50] Oregon Health Policy Bd., *Building Oregon's Health Insurance Exchange, A Report to the Oregon Legislature* 3-5 (Dec. 2010), http://www.oregon.gov/oha/action-plan/exchange-report.pdf.

[51] Wash. H.B. Rep., SSB 5445, 2011 Session 2-3 (2011), http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/House/5445-S%20HBR%20APH%2011.pdf.

[52] Nat'l Governors Ass'n, *State Perspectives on Insurance Exchanges: Implementing Health Reform in an Uncertain Environment* (Sept. 16, 2011), http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.PDF.

[53] Dash, *supra* note 45, at 9-13; Robert Wood Johnson Found., *Health Policy Brief, Health Insurance Exchanges and State Decisions* 4-6 (July 18, 2013), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf407092.

about the cost or burden of operating their own Exchange.[54]

Conspicuously absent from the Amici States' deliberations was any notion that choosing an FFE would deprive citizens of tax credits. For example:

- Virginia Governor Robert F. McDonnell's correspondence with Secretary Sebelius memorialized Virginia's understanding "that the choice of a state based, federal, or hybrid/partnership exchange are all equally valid in complying with the law."[55] Governor McDonnell emphasized that Virginia was unaware of any "clear benefits of a state run exchange to our citizens."[56]

- New Hampshire enacted legislation that *assumed* the availability of tax credits in its federally-facilitated Exchange. The statute created an advisory board whose members must include a person "who can reasonably be expected to purchase individual coverage through the exchange with *the assistance of a premium tax credit*."[57]

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[54] Dash, *supra* note 45, at 12-13.

[55] Letter from Governor Robert F. McDonnell to Sec'y Kathleen Sebelius (Dec. 14, 2012), Va. Amicus Br. 25a, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (No. 14-1158) (ECF No. 36-1).

[56] *Id.* at 26a.

[57] N.H. Rev. Stat. Ann. § 420-N:10(I)(h)(1) (2014) (emphasis added).

- Delaware Governor Jack Markell said that, in selecting a partnership Exchange, Delaware sought to "leverage a shared federal infrastructure, retain management of critical areas most directly impacting Delawareans, and ensure financial viability in light of the size of our population and market."[58] The goal was "to ensure access to quality affordable health care for all Delawareans."[59] As the governor's advisor testified before Congress, Delaware chose the partnership model believing that it would provide health insurance to a "significant number" of uninsured Delawareans, including by providing them "subsidies through the exchange."[60]

- Illinois Governor Pat Quinn said that Illinois opted for a federal partnership exchange "to increase access to quality health care and improve the health of the people of Illinois," noting that

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[58] Letter from Governor Jack A. Markell to Sec'y Kathleen Sebelius (Nov. 14, 2012), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/de-exchange-letter.pdf.

[59] *Id.*

[60] *Health Insurance Exchanges: Progress Report: Hearing Before the Sen. Comm. on Fin.*, 113th Cong. 35 (2013) (statement of Bettina Tweardy Riveros, Advisor to the Governor and Chair of the Delaware Health Care Commission).

> Illinoisans "deserve *all the benefits afforded to them*" under the ACA.[61]

The deliberations of the Amici States that decided to create their own Exchanges make equally clear that their decisions were not based on tax-credit availability. If Petitioners were right, depriving citizens of tax credits would have been the *overwhelming* factor warranting a State-based Exchange. But the States instead mentioned other reasons for their decision. Many wished to retain control over their own Exchanges, thereby allowing them to tailor the Exchange to regional and local concerns. For instance:

- New York Governor Andrew M. Cuomo explained that New York would be "best positioned" to "understand the ramifications of operating an Exchange within" the State's insurance markets and to "consider the unique regional and economic needs" of New Yorkers;[62]
- Rhode Island Governor Lincoln D. Chafee likewise explained that building an Exchange would allow Rhode Island to

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[61] Letter from Governor Pat Quinn to Gary Cohen, Acting Dir., CMMS (Oct. 16, 2012) (emphasis added), https://www.cms.gov/CCIIO/Resources/Technical-Implementation-Letters/Downloads/il-exchange-letter.pdf.

[62] Exec. Order (Cuomo) No. 42, 9 N.Y.C.R.R. § 8.42 (N.Y. 2012).

maintain "regulatory authority over [its] commercial health insurance market";[63]

- The Idaho legislature found that "a state-based health insurance exchange will provide an Idaho-specific solution that fits the unique needs of the state of Idaho";[64] and
- Kentucky Governor Steven L. Beshear issued an executive order noting that the fundamental obligations of an Exchange—including "[e]nabling eligible individuals to receive premium tax credits"—were the same in "every state in America,"[65] but finding that a State-based Exchange would best meet Kentucky's "unique regional and economic needs."[66]

Some States also found that a State-based Exchange would provide the best system for coordinating with their *preexisting* State healthcare programs, as in Kentucky[67] and Hawaii.[68] Several Amici States also

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[63] Exec. Order (Chafee) No. 11-09 (R.I. 2011), http://www.healthcare.ri.gov/documents/Exec%20Order%2011-09%20as%20Signed.pdf.

[64] Idaho Code Ann. § 41-6102 (West 2014).

[65] Exec. Order (Beshear) No. 2012-587, at 1 (Ky. 2012), http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2012-MISC-2012-0587-222943.pdf.

[66] *Id.* at 2.

[67] *Id.*

[68] 2011 Haw. Sess. Laws, Act 205, § 2.

cited the substantial financial incentives that Congress expressly provided to help them build their own Exchanges.[69] Indeed, as of October 2014, the States had received more than $4.8 billion in such funding.[70]

These States at no point suggested that they were building their own Exchanges so their citizens could enjoy the far more substantial benefits provided by premium-assistance tax credits. The opposite is true. For instance, the Washington State Health Care Authority explained that tax credits would "accrue to *every state regardless of how the state implements an Exchange*."[71]

Against all of this evidence, Oklahoma, together with Alabama, Georgia, Nebraska, and South Carolina, assert that "[i]n making their Exchange-establishing decisions, the States were well aware that the plain text of Section 36B conditioned the availability of tax credits on States establishing exchanges."[72] But the

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[69] *E.g.*, Ins. and Real Estate Comm., *Joint Favorable Report* 1-2 (Ct. Mar. 15, 2011), ftp://ftp.cga.ct.gov/2011/JFR/S/2011SB-00921-R00INS-JFR.htm.

[70] Annie L. Mach & C. Stephen Redhead, Cong. Research Serv., R43066, *Federal Funding for Health Insurance Exchanges* 2 (2014), http://fas.org/sgp/crs/misc/R43066.pdf.

[71] Washington Health Care Auth., Washington State Health Benefit Exchange Program, *Issue Brief #1: Goals and Value of a Health Benefit Exchange* 2 (Jan. 1, 2011) (emphasis added), http://wahbexchange.org/wp-content/uploads/HBE_Planning_Grant_Goal.pdf.

[72] Okla. Amicus Br. 15.

brief cites no evidence for that *ipse dixit*. Indeed, the facts appear otherwise.

In Nebraska, Governor Dave Heineman explained in November 2012 that the State had declined to create an Exchange due to its high cost.[73] But he insisted that the choice would have no adverse affect on Nebraskans. "On the key issues," he said, "there is no real operational difference between a federal exchange and a state exchange."[74]

The Georgia Health Insurance Exchange Advisory Committee advised Governor Nathan Deal that "Georgians will be eligible for these subsidies *whether the AHBE* [American Health Benefit Exchange] in Georgia *is established by the state or federal government*."[75] So when Governor Deal announced that Georgia would not create a State-based Exchange, his stated reason disclosed no awareness that it would deprive Georgians of millions of dollars in tax credits; instead, he objected to "Obamacare's one-size fits all

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[73] Joanne Young, *Heineman opts for federal health care exchange*, Lincoln Journal Star (Nov. 15, 2012), http://journalstar.com/news/state-and-regional/statehouse/heineman-opts-for-federal-health-care-exchange/article_c8b80018-c57b-52c7-807c-807535e3533a.html.

[74] *Id.*

[75] Georgia Health Ins. Exchange Advisory Comm., *Report to the Governor* 13 (Dec. 15, 2011) (emphasis added), https://www.statereforum.org/system/files/179765813ghix_final_report_to_the_governor.pdf.

approach and the high cost that the law places on states."[76]

The rejection of a State-based Exchange by the Governors of both Alabama[77] and South Carolina[78] similarly referenced opposition to the ACA, and to the costs imposed on States, but disclosed no awareness that State citizens would also forfeit billions in tax-credit dollars. In fact, South Carolina's Health Planning Committee assumed that there was no difference in tax-credit availability,[79] and Governor Haley thereafter described Congress's incentive for State-created Exchanges to be the "outrageously large" financial "grants" to assist States in establishing them, not the availability of tax credits.[80] She wrote

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[76] Press Release, Office of the Governor, Deal: Georgia will not set up state exchange (Nov. 16, 2012), http://gov.georgia.gov/press-releases/2012-11-16/deal-georgia-will-not-set-state-exchange.

[77] Press Release, Office of Alabama Governor Robert J. Bentley, Governor Bentley Announces Alabama Will Not Set Up State Insurance Exchange (Nov. 13, 2012), http://governor.alabama.gov/newsroom/2012/11/governor-bentley-announces-alabama-will-not-set-up-state-insurance-exchange/.

[78] Letter from South Carolina Governor Nikki R. Haley to Senator Jim DeMint (July 2, 2012), http://governor.sc.gov/Documents/Letter%20to%20Senator%20DeMint.pdf.

[79] South Carolina Health Planning Comm., *Improving the Health Care Marketplace in South Carolina* 17 (Nov. 2011), http://doi.sc.gov/DocumentCenter/View/2534 ("if a state chooses not to create its own exchange, the federal government will operate one in that state" and "exchanges will provide . . . premium and cost-sharing subsidies").

[80] Letter from Governor Haley, *supra* note 78, at 1.

that "[b]y refusing to implement state-based exchanges, the state is ceding nothing . "[81]

And in West Virginia, State officials answered "yes" in June 2012 to the question "Will individuals who are enrolled in coverage through a Federally-facilitated Exchange have access to premium tax credits "[82] Contemporary news accounts surrounding West Virginia's decision to forgo a State-based exchange in favor of an FFE made no mention that tax credits were available through one but not the other.[83]

Oklahoma alone can genuinely claim to be differently situated. In September 2012, after *NFIB* was decided, Attorney General Pruitt added a claim to Oklahoma's then-pending lawsuit to argue that the IRS Rule was impermissible.[84] Two months later, Governor Mary Fallin announced that Oklahoma would not pursue a State-based Exchange and that she supported General Pruitt's "ongoing legal

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[81] *Id.* at 2.

[82] *WV Health Benefits Exchange Stakeholder Meeting Summary* 3 (May 9, 2012), http://bewv.wvinsurance.gov/Portals/2/pdf/CarrierNotesMay2012.pdf.

[83] Eric Eyre, *W.Va. and feds to share health insurance exchange*, W. Va. Gazette (Dec. 10, 2012), http://www.wvgazette.com/News/201212100096.

[84] Am. Compl. ¶ 11, *Oklahoma ex rel. Pruitt v. Burwell*, No. 6:11-cv-00030-RAW (E.D. Okla. Sept. 19, 2012) (ECF No. 35).

challenge."[85] Yet even Oklahoma's position is not without contradiction, as the State has continued to advise eligible Oklahomans that they "qualify for the federal Health Insurance Marketplace *and related advance premium tax credits.*"[86]

In any event, the fact that some Oklahoma officials adopted an unusual litigating position in September 2012 does not demonstrate that the ACA provided *Pennhurst*'s objectively "clear notice" when it was enacted in 2010. Nor does Oklahoma's legal position show that officials in *other* States made their Exchange-election decisions with knowledge that tax credits would be unavailable.

To the contrary, the evidence marshaled above, and by others,[87] shows that Amici States here, and officials in nearly every State, lacked any notice, let alone clear notice, that adopting an FFE would

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[85] *See* Press Release, Governor Mary Fallin, Gov. Fallin: Oklahoma Will Not Pursue a State-Based Exchange or Medicaid Expansion (Nov. 19, 2012), http://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=9750.

[86] *See* Press Release, Governor Mary Fallin, Governor Fallin Announces Extension of Insure Oklahoma (Sept. 6, 2013), http://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=12653 (emphasis added).

[87] *See also* Christine Monahan, Halbig v. Sebelius *and State Motivations to Opt for Federally Run Exchanges*, Ctr. on Health Ins. Reforms (Feb. 11, 2014), http://chirblog.org/halbig-v-sebelius-and-state-motivations-to-opt-for-federally-run-exchanges/ (finding little evidence that tax-credit availability played a role in States' decisions to create a State-based Exchange).

deprive citizens of billions in subsidies and destabilize State insurance markets.[88]

C. The States had no clear notice from the text, structure, purpose or history of the ACA that citizens in FFE States would be denied premium-assistance tax credits.

From "the perspective of a state official,"[89] there was nothing in the text, structure, purpose or history of the ACA to give them clear notice of Petitioners' interpretation. The ACA is one of the most elaborate statutory programs ever devised. It comprises "10

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[88] Two of Petitioners' amici search for States that might have made their Exchange-election decisions based on the legal issue here. Mo. Liberty Project Amicus Br. 15-20; Galen Inst. Amicus Br. 13-14. Their citation of New Hampshire is clearly wrong, given that the legislature there required that a New Hampshire citizen who receives "a premium tax credit" serve on the State's advisory board. *See* note 57 *supra* and accompanying text. Their other examples are also based on speculative and unreliable evidence. For instance, the Missouri Project cites a recent article in which Petitioners' amicus, Michael Cannon, claims credit for influencing Maine's decision, although the article's author himself concluded from State records that "[i]t's unclear from the documents whether the LePage administration anticipated . . the court case that challenges the legality of premium subsidies in the federal exchange." Steve Mistler, *Outspoken critic of Obamacare helped to turn LePage against state exchange*, Portland Press Herald (Nov. 23, 2014), http://www.pressherald.com/2014/11/23/outspoken-critic-of-obamacare-helped-to-turn-lepage-against-state-exchange/.

[89] *Arlington Cent.*, 548 U.S. at 296.

titles stretch[ing] over 900 pages and contain[ing] hundreds of provisions."[90]

Under Petitioners' interpretation, the provision barring federal subsidies in FFE States is buried in two sub-subsections of 26 U.S.C. § 36B. The phrase "an Exchange established by the State under [§] 1311" appears in the provision describing part of the calculation of an individual tax credit (§ 36B(b)(2)(A)), and again in the definition of "coverage month" (§ 36B(c)(2)(A)). Petitioners infer from that usage that Congress intended to deny tax credits to citizens in FFE States in order to pressure States to build their own Exchanges.

But those isolated phrases fail *Pennhurst*'s clear-notice test. For starters, Congress does not "hide elephants in mouseholes."[91] It is unreasonable to expect State officials to have found clear notice of Congress's supposed threat in obscure sub-subsections of the tax code pertaining to the calculation of an individual's tax credit.

What is more, by focusing narrowly on the phrase "created by the State," Petitioners violate the whole-text canon, perhaps the most common mistake made when interpreting a statute.[92] "Over and over,"

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[90] *NFIB*, 132 S. Ct. at 2580.

[91] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[92] *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("Perhaps no

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this Court has "stressed that '[i]n expounding a statute, we must *not* be guided by a *single sentence or member of a sentence*, but look to the provisions of the *whole law*, and to its object and policy.'"[93] Even when a particular reading of a sentence in one section may be "the most natural reading . . when viewed in isolation, statutory language must always be read in its proper context look[ing] to the particular statutory language at issue, as well as the language and design of the statute as a whole."[94] Thus, "a court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context."[95]

In this case, although the two occurrences of "established by the State" in § 36B could be read in isolation to support Petitioners' view, "all of the other evidence from the statute points the other way."[96] Within § 36B itself, subsection (a)—which establishes the right to tax credits—authorizes tax credits for "applicable taxpayer[s]," a term whose definition does not turn on whether the taxpayer's own State has

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interpretive fault is more common than the failure to follow the whole-text canon . . . .").

[93] *U.S. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)) (emphasis added).

[94] *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

[95] *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014).

[96] *U.S. Nat'l Bank*, 508 U.S. at 455.

itself set up the Exchange. Other provisions of § 36B addressing the tax-credit calculation use the term "Exchange" by itself.[97] State officials reviewing § 36B therefore would have had no sensible reason to conclude, let alone clear notice, that the two occurrences of "established by the State" had the far-reaching effect Petitioners assert.

And even if State officials had zeroed in on the phrase "Exchange established by the State under § 1311"—"the way Waldo's whereabouts" are revealed when flagged with a highlighter[98]—they would still have to look up the meaning of the defined-and-capitalized term "Exchange," and then look at § 1311 (42 U.S.C. § 18031) to see what that section says about it. So the language in § 36B "merely raises, rather than answers, the critical question . . ."[99] "In answering that inquiry, we must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose, . . not to mention common sense . . ."[100]

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[97] *See* 26 U.S.C. § 36B(d)(3)(B), (e)(3), (f)(3).

[98] Vikram David Amar, *Why the Federalism Teachings from the 2012 Obamacare Case Weaken the Challengers' Case in* King v. Burwell, Verdict (Dec. 5, 2014), http://verdict.justia.com/2014/12/05/federalism-teachings-2012-obamacare-case-weaken-challengers-case-king-v-burwell.

[99] *Abramski*, 134 S. Ct. at 2267.

[100] *Id.* (quotations omitted).

Section 1311 provides that "Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange (referred to in this title as an 'Exchange')."[101] Congress provided financial assistance to help States do so.[102] But what if a State did not want to build an Exchange or would not have it operational by 2014? Section 1321(c) (42 U.S.C. § 18041(c)) took care of that: the Secretary shall "establish and operate *such Exchange* within the State."[103]

So is a federally-facilitated Exchange ("such Exchange") the same, for purposes of the ACA, as an Exchange "established by the State"? Yes, because the word "Exchange" is a defined term of art, and the *only* kind of Exchange defined in the ACA is an Exchange established by the State under § 1311.

"Exchange" is defined in 42 U.S.C. § 300gg-91(d)(21) as "an American Health Benefit Exchange established under section 18031 [ACA § 1311] of this title." There is no *other* definition of "Exchange" and no separate definition of an Exchange established by the Secretary. Section 18031(d) repeats the point by making it a general requirement that an Exchange "shall be a governmental agency or nonprofit entity *that is established by a State*."[104] And the

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[101] 42 U.S.C. § 18031(b)(1).

[102] 42 U.S.C. § 18031(a).

[103] 42 U.S.C. § 18041(c)(1) (emphasis added).

[104] 42 U.S.C. § 18031(d)(1) (emphasis added).

defined-and-capitalized term "Exchange" is then used throughout the ACA, including in the tax-credit provisions in § 36B.

Returning to § 18041(c)(1), the "such Exchange" that the Secretary establishes (when the State does not) is properly treated as the "Exchange established by the State under § 1311." That is so because there is no other Exchange defined in the ACA that it could be. Indeed, officials in various States repeatedly noted that the Exchange would be legally the same regardless of which sovereign created it.[105] As Maryland's agency put it: "The ACA provides that all states must either create their own health benefit exchanges or allow the federal government to do it for them."[106]

Petitioners pay scant attention to the ACA's statutory definition, relying instead on a colloquial understanding of "Exchange established by the State" in § 36B(b)(2)(A) and (c)(2)(A)(1). But the statutory definition is essential, for the definition Congress assigns is "assuredly dispositive" of its scope "for purposes of matters that are within Congress'

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[105] *E.g.*, Exec. Order (Chafee), *supra* note 63, at 1 ("if a state does not elect to establish an Exchange, [HHS] shall establish and operate such Exchange within the state"); Wash. H.B. Rep., SSB 5445, *supra* note 51, at 2 ("If a state chooses not to establish an AHBE, the federal government will operate an AHBE.").

[106] Maryland Health Care Reform Coordinating Council, *Final Report and Recommendations* 14 (Jan. 1, 2011), http://marylandhbe.com/wp-content/uploads/2012/10/HCRCC-FINALREPORT_jan20111.pdf.

control."[107] Thus, the Court in *NFIB* found that the individual mandate was not a "tax" for purposes of the Anti-Injunction Act because Congress called it a "penalty," even though the constitutionality of the individual mandate depended on its characterization as a "tax" for constitutional purposes.[108] Congress can likewise say that "such Exchange" established by the Secretary counts as the Exchange established by the State in discharge of its obligation to create one under § 18031.

The ACA may not be "a *chef d'oeuvre* of legislative draftsmanship. But we must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[109]

Under the whole-text canon, moreover, *other* provisions of the ACA confirm that Petitioners' reading is untenable. For example, § 18083 directs the Secretary to ensure that residents of "each State" may enroll in an Exchange in a manner that gives them access to premium-assistance tax credits. Subsection (a) requires the Secretary to "establish a system . under which residents of *each State* may

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[107] *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

[108] *See NFIB*, 132 S. Ct. at 2583, 2594.

[109] *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (citation and quotation omitted).

apply for enrollment in, receive a determination of eligibility for participation in, and continue participation in, *applicable State health subsidy programs*."[110] Subsection (e) defines "applicable State health subsidy programs" as "including the premium tax credits under section 36B of title 26."[111] Thus, section 18083 shows that Congress intended for tax credits to be available in "each State."

The ACA also defines a "qualified individual" who can enroll in an Exchange as "an individual who resides *in the State that established the Exchange*."[112] If Petitioners' theory were applied to that section, *no one* would be eligible to enroll in a *federally-facilitated* Exchange because it would not be an Exchange that the State itself has established. That reading makes no sense and would violate the presumption against ineffectiveness.[113] By contrast, reading "Exchange" as a single defined term—an American Health Benefit Exchange that the State is required to establish, whether by doing so itself or by letting the Secretary establish "such Exchange within the State"[114] on its behalf—resolves the conundrum throughout the ACA.

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[110] 42 U.S.C. § 18083(a) (emphasis added).

[111] *Id.* § 18083(e)(1).

[112] 42 U.S.C. § 18032(f)(1)(A) (emphasis added).

[113] Scalia & Garner, *supra* note 92, at 63.

[114] 42 U.S.C. § 18041(c)(1).

The ACA's Medicaid maintenance-of-effort provision would also become dysfunctional in Petitioners' world. That provision states that until "the date on which the Secretary determines that an Exchange *established by the State* under section 18031 of this title is fully operational," the State cannot make its Medicaid-eligibility standards "more restrictive" than those in effect on March 23, 2010.[115] Under Petitioners' interpretation, FFE States would *never* come into compliance and would have their Medicaid-eligibility standards frozen indefinitely. Ironically, the FFE States that have applied for and received approval of more restrictive Medicaid-eligibility standards include three of Petitioners' amici—Oklahoma, Indiana, and Nebraska.[116] Indiana has even used tax-credit availability as one of the justifications for its waiver request.[117] Other FFE States have likewise submitted waiver applications to HHS that assume the availability of tax credits, such as Arkansas,[118] Iowa,[119]

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[115] 42 U.S.C. § 1396a(gg)(1) (emphasis added).

[116] Resp'ts' Br. 29.

[117] Indiana Family & Soc. Servs. Admin., *Healthy Indiana Plan 1115 Waiver Extension Application* 29, 44 (Apr. 12, 2013), *Indiana v. I.R.S.*, No. 1:13-cv-01612 (S.D. Ind. Apr. 16, 2014), ECF No. 61-11.

[118] Arkansas Medicaid, *Proposed Amendment to Health Care Independence (aka Private Option) 1115 Waiver* 3, https://www.medicaid.state.ar.us/general/comment/demowaivers.aspx.

[119] Iowa Dep't of Human Servs., *Iowa Wellness Plan 1115 Waiver Application* 8, 21, 29, 49 (Aug. 2013), http://dhs.iowa.gov/sites/default/files/IAWellnessPlan1115_Final.pdf.; *Iowa Marketplace*

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Pennsylvania,[120] and Tennessee.[121] That practical construction further confirms that "Exchange established by the State" means the defined Exchange established under § 1311, regardless of whether the State itself establishes it or the Secretary establishes "such Exchange" on the State's behalf.

Finally, the Petitioners' theory would make surplusage of the reporting requirements in § 36B(f). That section requires all Exchanges to report to the Secretary six categories of information (subsections A-F) for each health plan purchased. Four of the six involve tax-credit information: (B), the "total premium for the coverage without regard to the credit"; (C), the "aggregate amount of any advance payment of such credit"; (E), "[a]ny information provided to the Exchange . necessary to determine eligibility for, and the amount of, such credit"; and (F), "information necessary to determine whether a taxpayer has received excess advance payments."[122] That reporting requirement would make little sense if credits were unavailable in FFE States.

Choice Plan 1115 Waiver Application 3, http://dhs.iowa.gov/sites/default/files/IAMktplaceChoice1115_Final.pdf.

[120] Pennsylvania Dep't of Pub. Welfare, *Healthy Pennsylvania 1115 Demonstration Application* 10-12 (Feb. 2014), http://www.dpw.state.pa.us/cs/groups/webcontent/documents/document/c_071204.pdf.

[121] Insure Tennessee, *Waiver Amendment Request, TennCare, Demonstration Amendment #25* 1, https://news.tn.gov/sites/default/files/Insure%20Tennessee%20-%20Waiver%20Amendment.pdf.

[122] 26 U.S.C. § 36B(f)(3)(B), (C), (E), (F).

Petitioners' construction also undermines the clear purpose of the ACA as reflected in its statutory text and structure: to provide affordable health insurance to as many Americans as possible. The requirement in § 18083(a) to ensure enrollees' ability to qualify for tax credits in "each State" is but one example. More broadly, the title in which § 36B appears is called "Quality, Affordable Health Care for *All* Americans."[123] The subtitle is "Affordable Coverage Choices for *All* Americans."[124] Congress's choice of the word "all" confirms that the phrase Petitioners pluck from § 36B was not meant to deny affordable health coverage in FFE States and to destroy State insurance markets.

Although the court of appeals found the ACA's legislative history "not particularly illuminating on the issue of tax credits,"[125] to the States' ears, Congress spoke loudly and one-sidedly to the point at issue here:

- Senator Baucus said "tax credits will help to ensure *all* Americans can afford quality health insurance."[126]
- Senator Johnson said the ACA will "form health insurance exchanges in *every* State through which those limited to the

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[123] 124 Stat. 130 (emphasis added).

[124] 124 Stat. 213 (emphasis added).

[125] *King*, 759 F.3d at 371.

[126] 155 Cong. Rec. S11,964 (Nov. 21, 2009) (emphasis added).

> individual market will have *access to affordable and meaningful coverage.*"[127]

- Senator Durbin said "we will help you pay your health insurance premiums, give you tax breaks to pay those premiums. That means a lot of people who today cannot afford to pay for health insurance premiums will be able to."[128] He added that "30 million Americans today who have no health insurance *will qualify for . tax credits* to help them pay their premiums so they can have and afford health insurance."[129]

- Senator Bingaman said that the ACA "includes creation of a new health insurance exchange in each State which will provide Americans . meaningful private insurance *as well as refundable tax credits to ensure that coverage is affordable.*"[130]

One of the ACA's staunchest opponents, Representative Paul Ryan, criticized the law *because* it made tax credits available in every State:

> [I]t's a new, open-ended entitlement that basically says that *just about everybody in this country*—people making less than

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[127] 155 Cong. Rec. S13,375 (Dec. 17, 2009) (emphasis added).

[128] 155 Cong. Rec. S12,779 (Dec. 9, 2009).

[129] 155 Cong. Rec. S13,559 (Dec. 20, 2009) (emphasis added).

[130] 155 Cong. Rec. S12,358 (Dec. 4, 2009) (emphasis added).

> $100,000, you know what, if your health care expenses exceed anywhere from 2 to 9.8 percent of your adjusted gross income, don't worry about it, taxpayers got you covered, the government is going to subsidize the rest.[131]

As the States watched and listened to those debates, none of those statements would have made sense had Congress intended to withhold tax credits in FFE States. Tellingly, even Petitioners' amici—Jonathan Adler and Michael Cannon, the two conservative commentators who later published the roadmap for Petitioners' legal challenge—admitted that they "were both surprised to *discover* this feature of the law and initially characterized it as a 'glitch.'"[132] Judge Edwards of the D.C. Circuit put it more cynically: Petitioners' "incentive story is a fiction, a *post hoc* narrative concocted to provide a colorable explanation for the otherwise risible notion that Congress would have wanted insurance markets to collapse in States that elected not to create their own Exchanges."[133]

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[131] Verbatim Transcript, *Markup of the Reconciliation Act of 2010, H. Comm. on Budget*, 111th Cong., 2010 WL 941012 (Mar. 15, 2010) (emphasis added).

[132] Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule To Expand Tax Credits Under the PPACA*, 23 Health Matrix 119, 123 (2013) (emphasis added).

[133] *Halbig*, 758 F.3d at 416 (Edwards, J., dissenting).

From the States' perspective, then, not only was there no "clear notice" that opting for a federally-facilitated Exchange would deny citizens tax credits and ruin insurance markets, but a chorus of congressional leaders uniformly signaled the opposite. Congress promised a cooperative-federalism model, one promoting "State *Flexibility* Relating to Exchanges,"[134] not a model based on federal threats and coercion. Indeed, the most significant aspect of the legislative history is the *absence* of any evidence supporting Petitioners' interpretation.

"Congress' silence in this regard can be likened to the dog that did not bark,"[135] from which Sherlock Holmes deduced that the perpetrator must have been known to the dog.[136] If anyone in Congress had actually proposed coercing the States in the manner claimed by Petitioners, it would have engendered howls of protest from the ACA's opponents and from those who normally resist efforts by the federal government to impose undue pressure on the States. Yet there was not so much as a growl of disapproval about the iniquitous scheme Petitioners postulate here.

The best that Petitioners and their amici come up with are YouTube videos of Professor Jonathan

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[134] 124 Stat. 120 (Title I, Subtitle D, part 3) (emphasis added).

[135] *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

[136] *Id.* (citing A. Doyle, *Silver Blaze*, *in* The Complete Sherlock Holmes 335 (1927)).

Gruber, a private citizen appearing at non-governmental meetings years after the ACA was enacted.[137] But they fail to demonstrate that Professor Gruber's message was disseminated to the *State* officials responsible for determining whether to build their own Exchange. In any event, Gruber later corrected himself, calling his earlier statements a mistake[138] and pointing out that his own economic simulations "expressly modeled for the citizens of *all states* to be eligible for tax credits, whether served directly by a state exchange or by a federal exchange."[139]

Judge Edwards was correct in *Halbig v. Burwell* that the ACA provided no "notice to States that their taxpayers will be denied subsidies if the State elects to have HHS create an Exchange on its behalf."[140] If that consequence could not be discerned by the

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[137] *See, e.g.*, Pet'rs' Br. 4-5, 42-43; Sen. Cornyn Amicus Br. 13-14; Mountain States Legal Found. Amicus Br. 10.

[138] Jonathan Cohn, *Jonathan Gruber: 'It Was Just a Mistake,' An Obamacare architect explains a 2012 quote that's fueling critics*, New Republic (July 25, 2014), http://www.newrepublic.com/article/118851/jonathan-gruber-halbig-says-quote-exchanges-was-mistake.

[139] Written Testimony of Professor Jonathan Gruber before the Comm. on Oversight & Gov't Reform, U.S. House of Representatives 2 (Dec. 9, 2014) (emphasis added), http://oversight.house.gov/wp-content/uploads/2014/12/Gruber-Statement-12-9-ObamaCare1.pdf.

[140] 758 F.3d at 421 (Edwards, J., dissenting).

federal district judge in this case,[141] nor by the one in *Halbig*,[142] nor by (now) four federal circuit judges,[143] how could the States have been on "clear notice"?

IV. The constitutional-doubt canon also counsels against Petitioners' ACA interpretation, which raises serious questions under the Tenth Amendment.

"A statute should be interpreted in a way that avoids placing its constitutionality in doubt."[144] The constitutional-doubt canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality."[145] Because Petitioners' interpretation would raise a very serious

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[141] *King v. Sebelius*, 997 F. Supp. 2d 415, 427-32 (E.D. Va. 2014) (Spencer, J.), *aff'd sub nom. King v. Burwell*, 759 F.3d 358 (4th Cir. 2014).

[142] *Halbig v. Sebelius*, No. CV 13-0623 (PLF), 2014 WL 129023, at *18 (D.D.C. Jan. 15, 2014) (Friedman, J.), *rev'd and remanded sub nom. Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014), *reh'g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014).

[143] *King*, 759 F.3d at 372-73 (Gregory, J., joined by Thacker, J.); *id.* at 376 (Davis, J., concurring); *Halbig*, 758 F.3d at 426 (Edwards, J., dissenting).

[144] Scalia & Garner, *supra* note 92, at 247 (citing *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

[145] *Id.* at 247-48 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

constitutional question under the Tenth Amendment, their reading of the ACA should be rejected.

In *New York v. United States*[146] and *Printz v. United States*,[147] this Court recounted the Framers' choice to adopt a federal system that operates without coercing States into implementing federal programs. In *NFIB*, the Court explained that cutting off all Medicaid funding to States that declined Medicaid expansion constituted "much more than relatively mild encouragement—it is a gun to the head."[148] It "'crossed the line distinguishing encouragement from coercion,'"[149] serving "no purpose other than to force unwilling States" to comply.[150]

In the court of appeals, Petitioners argued that the scheme they attribute to Congress was "the same" in its coercive nature as one invalidated in *NFIB*.[151] In this Court, Petitioners prefer understatement, saying that "Congress could quite reasonably believe that elected state officials would not want to explain to voters that they had deprived them of billions of

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[146] 505 U.S. at 164-66.

[147] 521 U.S. 898, 919-22 (1997).

[148] 132 S. Ct. at 2604 (plurality) (quotation omitted); *see also id.* at 2659-66 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (agreeing mechanism was coercive).

[149] *Id.* at 2603 (plurality) (quoting *New York*, 505 U.S. at 175).

[150] *Id.*

[151] Appellants' Opening Br. 44, *King v. Sebelius*, 759 F.3d 358, 375 (4th Cir. 2014) (No. 14-1158), ECF No. 14.

dollars by failing to establish an Exchange."[152] Either way, it is a novel kind of pressure to threaten to injure a State's citizens and to destroy its insurance markets in order to force State-government officials to implement a federal program.

This Court recently said in *Bond v. United States* that "if the Federal Government would radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit about it."[153] As in *Bond*, Congress was not "utterly clear"[154] about that here. And because Petitioners' interpretation of the ACA would raise a serious Tenth Amendment question, it must be rejected in favor of the Government's more plausible reading, which avoids that infirmity.

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[152] Pet'rs' Br. 32.

[153] 134 S. Ct. 2077, 2089 (2014) (quotations omitted).

[154] *Id.* at 2093.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MARK R. HERRING
Attorney General of Virginia

CYNTHIA BAILEY
Deputy Attorney General

KIM PINER
Senior Assistant Attorney General

CARLY L. RUSH
Assistant Attorney General

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STUART A. RAPHAEL*
Solicitor General of Virginia

TREVOR S. COX
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240 – Telephone
(804) 371-0200 – Facsimile
sraphael@oag.state.va.us

**Counsel of Record*

KAMALA D. HARRIS
Attorney General of California
1300 I Street, Suite 125
Sacramento, CA 95814

GEORGE JEPSEN
Attorney General
of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General of Delaware
820 N. French Street, 6th Floor
Wilmington, DE 19801

KARL A. RACINE
Attorney General for the
District of Columbia
441 4th Street, NW
Washington, DC 20001

RUSSELL A. SUZUKI
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street,
12th Floor
Chicago, IL 60601

TOM MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

JACK CONWAY
Attorney General of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

JANET T. MILLS
Attorney General of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
of Massachusetts
One Ashburton Place
Boston, MA 02108

JIM HOOD
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

JOSEPH A. FOSTER
Attorney General of
New Hampshire
33 Capitol Street
Concord, NH 03301

HECTOR H. BALDERAS
Attorney General of
New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

ERIC T. SCHNEIDERMAN
Attorney General of
New York
120 Broadway, 25th Floor
New York, NY 10271

ROY COOPER
Attorney General of
North Carolina
P.O. Box 629
Raleigh, NC 27602

WAYNE STENEHJEM
Attorney General of
North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street, N.E.
Salem, OR 97301

KATHLEEN G. KANE
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

PETER F. KILMARTIN
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General of
Washington
P.O. Box 40100
1125 Washington Street SE
Olympia, WA 98504